IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JAMES W. DEATON — PLANTIFF

V. — NO. 1:92CV027-S-D

R. DEAN PLOWMAN, ET AL, — DEFENDANTS

O P I N I O N

Plaintiff asserts that he was demoted because of his alleged handicap in violation of §504 of the Rehabilitation Act of 1973, and for reprisal in violation of Title VII of the Civil Rights Act of 1964. Plantiff also asserts constitutional tort claims for damages, based upon the Bivens[1] theory. Currently before the court is defendants' motion to dismiss the complaint.[2]

F A C T S

The plantiff, James W. Deaton, suffers from a rare type of leukemia, known as hairy cell leukemia. This condition resulted in the necessity of a splenectomy[3] in January of 1989. The plantiff

[1] Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau, 403 U.S. 388, 91 S.Ct. 1999, 29 L. Ed. 2d 619 (1971).

[2] Originally, defendants also requested that the court substitute the United States as the proper defendant concerning plantiff's common law claims. In plantiff's response to the instant motion, he asserted that he was not bringing any claims pursuant to the Federal Tort Claims Act.

[3] A splenectomy is the "surgical removal of the spleen." Webster's Ninth New Collegiate Dictionary (1984).

has been employed by the Agricultural Research Service of the United States Department of Agriculture for approximately twenty-five years. At the time of the alleged discrimination, plantiff held the position of a GM-15 research leader at a poultry research facility based at Mississippi State University. Plantiff was ordered to oversee a project researching Salmonella Enteritidis in chickens. The research project was to be conducted on an "open flock," instead of on birds in segregated areas.

In response to this order, plantiff voiced his concerns that this would pose a safety hazard to the employees and to the community. His concern was based on his belief that the pathogen could be easily transmitted, and therefore, the research should be conducted in an isolated area.

Plantiff asserts that he did not refuse to conduct the research but wanted to delay it until the research unit could have constructed a safe research facility. Plantiff thereafter learned that the cost of constructing such a building would be $1.9 million. In May of 1989, plantiff informed the area director that he was unwilling to research on an "open flock" basis. In June of 1989, the funding for the project ($650,000) was cancelled. Later that year, in December, plantiff was removed from his position as research leader to that of a research animal scientist. Plaintiff

suffered no reduction in grade or pay level as a result of this change.

The plantiff claims that he was removed from his position of research leader because the director believed that the plantiff would not conduct the research due to his handicap, which affects his immune system. The plantiff states that he knew how to protect himself, and that he was not concerned for his own safety but was truly concerned for the safety of the community.

In response, the area director said that the reassignment was based on events that began in 1987. The director stated that the plantiff had a history of interpersonal difficulties with co-workers and that the plantiff was unreasonable when the department needed to reduce the research budget. He also maintained that the plantiff lacked the essential leadership qualities necessary for one in the position of a research leader.

D I S C U S S I O N

I.

REHABILITATION ACT

Plantiff claims that he was discriminated against because of his handicap, and therefore has a claim under the Rehabilitation Act of 1973, §504. The defendants argue that this claim should be dismissed for failure to name the Secretary of the Department of Agriculture as the proper party defendant. The defendant is correct, in that the proper defendant is the "head of the

department, agency, or unit." 29 USC §794a (a)(1). However, this court prefers, when possible, to consider the merits of a case rather than to dismiss it, especially when the rules of procedure contemplate the particular issue now raised by the defendants. Fed. R. Civ. Pro. 17(a) addresses the issue of the real parties in interest, stating in part:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest, until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The mission of this rule is to "avoid forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought."[4] Rule 17(a) allows amending the pleading to correct the parties, even after the statute of limitations has run. Id. This lies parallel to the draftsmen's intentions in that an error at the pleading stage should not warrant dismissal of the action itself. Id.

In support of their argument, the defendants rely on Honeycutt v. Long, 861 F.2d 1346 (5th Cir. 1988). In Honeycutt, the plantiff filed suit against Major General John E. Long, in his role as Commander of the Army and Air Force Exchange Service. He did not

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[4] 6a Charles A. Wright, et al., Federal Practice and Procedure section 1555 (2d ed. 1990).

file an EEOC charge before instituting suit. The Fifth Circuit found that dismissal of the action for failure to name the proper party was appropriate since the Secretary of Defense, the real party in interest, had no notice of plantiff's claims of discrimination before the case was filed with the district court.

This court does not find Honeycutt persuasive under the facts of this case. Here, plantiff first filed an EEOC action against the Secretary of Agriculture, thereby apprising the Secretary of his claims of discrimination. Therefore, the real party in interest, the Secretary of Agriculture, knew of plantiff's claims prior to his filing suit, unlike the defendant in Honeycutt.

Towards fulfilling the goals of Rule 17(a), then, the court denies defendants' motion to dismiss the Rehabilitation Act claim and allows the plaintiff ten days to file an amended complaint naming the proper party defendant. Plaintiff must effect service pursuant to the Federal Rules of Civil Procedure. The service must be completed within thirty days, and failure to do so will result in dismissal of this claim, which, as will be explained infra, would terminate this cause.

II.

TITLE VII

Plantiff asserts that he has a claim for reprisal under Title VII of the Civil Rights Act of 1964, 42 USCA § 2000e et seq. In order to state a claim under the plain language of this statute,

discrimination must be based on race, color, religion, sex, or national origin. The defendants assert that this claim should be dismissed because of plaintiff's failure to name the proper party defendant, failure to exhaust administrative remedies, and failure to state a claim for reprisal under Title VII.

Even if plaintiff had named the proper party defendant and had properly exhausted his administrative remedies, he does not make a claim for reprisal under Title VII. 42 USC § 2000e-3 states:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testifies, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

The plantiff stated in his EEOC complaint that the "reprisal" occurred because he refused to put the health of the community at risk. This claim is not based on any of the covered areas under Title VII, and therefore is not actionable under that statute. Instead, his grievance is based on activities covered by the Whistleblower Act. That claim was presented to the Merit Systems Protection Board, which affirmed plaintiff's reassignment and found no corrective action was warranted under the Individual Right of Action provision of the Whistleblower Protection Act. 5 U.S.C. §1221. Upon appeal to the United States Court of Appeals for the Federal Circuit, that decision was affirmed. See Deaton v.

Department of Agriculture, NO. 92-3283 (Fed. Cir. Sept. 25, 1992). Plaintiff's petition for a writ of certiorari was subsequently denied. See Deaton v. Department of Agriculture, 122 L.Ed.2d 663 (1993).

As plaintiff has failed to enunciate a cause of action under Title VII, that is dismissed with prejudice.

III.

BIVENS

Finally, plantiff, who is covered by the Civil Service Reform Act[5], asserts that he has a constitutional tort claim under Bivens because the individually named defendants united to deprive him of a protected property and liberty interest without due process of law in violation of the Fifth Amendment to the United States Constitution.

The defendants move to dismiss this claim based on Schweiker v. Chilicky, 487 U.S. 412 (1988), and Bush v. Lucas, 462 U.S. 367 (1983). These cases severely limited the "availability of damages to federal employees for actions arising out of the federal employer-employee relationship." The defendants also note that "the Fifth Circuit has recognized consistently that federal employees are precluded from asserting a claim for money damages which arose from a personnel matter against their supervisors in

[5] Hereinafter cited as CSRA.

their individual capacities. See Rollins v. Marsh, 937 F.2d 134,139 (5th Cir. 1991)."

In response, plaintiff argues that the Bivens action should not be dismissed because "the case involves no special factors counseling hesitation in the absence of affirmative action by Congress," and "there is no explicit congressional declaration that persons injured by federal officers' violations of the Fifth Amendment may not recover damages from the officers but must be remitted to another remedy, equally effective in Congress' view."

In Bivens, supra, the Supreme Court first allowed damages for violations of constitutional rights of federal employees. Subsequently, the Court in Davis v.Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), explained the reach of Bivens and allowed a Bivens action in a situation where a comprehensive scheme of remedies was not available to afford the plaintiff any relief. In the Court's view, to prevent plaintiff from pursuing a Bivens action would, under the facts of Davis, have left plaintiff with no remedy for her grievance. Three years later, in Bush, the Court addressed the situation at issue

here and narrowed the reach of Bivens. The Bush Court found that a federal employee claiming a violation of the Constitution does not have a cause of action for damages under Bivens due to the comprehensive scheme of remedies available under the Civil Service Commission Regulations.

In this case, plantiff acknowledges that a Bivens claim is not favored by the Supreme Court. However, plantiff argues that there are no "special factors counselling hesitation in the absence of affirmative action by congress, [n]or have the defendants show[n] that congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery...."

The meaning of "special factors counselling hesitation" was discussed in Bush and has been analyzed by many courts since then. See Palermo v. Rorex, 806 F.2d 1266, 1271 (5th Cir. 1987); Feit v. Ward, 886 F.2d 848, 852- 855 (7th Cir. 1989); Lombardi v. Small Business Administration, 889 F.2d 959, 961 (10th Cir. 1989); and Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989). This Court finds the discussion of this phrase in Marshall V. O'Conner, No. 90-1214, 1991 WL 61744, at *2 (E.D.LA. Apr. 16, 1991), particularly instructive, as the issue was the same as presented here. That court concluded that the "existence of a government employer/employee relationship and the availability of a congressionally developed alternative remedy both constituted 'special factors counselling hesitation in formulating additional constitutional remedies.'" Id. at *2 (citing Bush, 103 S.Ct. at 2416-2417). These special factors in Bush kept the plantiff from recovering under Bivens. The court did not base its ruling on "whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who improperly

violated the employee's constitutional rights." Id. (citing Bush, 103 S.Ct. at 2417; Gremillion v. Chivatero, 749 F.2d 276, 278 (5th Cir 1985)). "Rather, the Court based its decision upon its conviction that congress is in a much better position than the judiciary to determine what remedies should be available to aggrieved government employees whose constitutional rights have been violated." Id.

This court agrees with the Marshall v. O'Conner court. Plaintiff's Fifth Amendment claim that he was deprived of a protected property and liberty interest without due process is foreclosed by Bush and its progeny and is dismissed with prejudice.

C O N C L U S I O N

Having carefully considered the matter, the court finds that defendants' motion is well taken as to the plaintiff's claims under Title VII and Bivens, and those claims are dismissed with prejudice. The Court refuses, however, to dismiss plaintiff's Rehabilitation Act claim but orders amendment to name the appropriate party. As this is the only remaining claim, failure to comply with the time limits set forth in this opinion and accompaning order will result in dismissal of this cause in its entirety.

An appropriate order shall be issued.

This _____ day of _____, 1995.

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CHIEF JUDGE